77-816

IN THE SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 1977

MICHAEL DRIELICK,
Petitioner,

v.

No. A-333

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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TABLE OF CONTENTS

INDEX TO THE APPENDIX

INDEX TO AUTHORITIES CITED

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Now comes Michael Drielick, by John A. Picard, his attorney, and respectfully petitions this Honorable Court for a Writ of Certiorari to the Supreme Court of the State of Michigan.

CITATIONS TO OPINIONS BELOW

The decision of the Michigan Supreme Court was filed on July 18, 1977, and is reported at 400 Mich 559; ..... NW2d ..... (1977). That opinion upheld a decision of the Michigan Court of Appeals which was filed on November 26, 1974, which is reported at 56 Mich App 664; 224 NW2d 712 (1974). Copies of both opinions are included in the appendix to this petition, *infra*, at pp A. 1-A. 13.

ORDER GRANTING EXTENSION OF TIME TO FILE PETITION FOR CERTIORARI

On October 12, 1977, an order was entered extending the time for the filing of the Petition for Certiorari to the Michigan Supreme Court to December 15, 1977.

JURISDICTION

The decision of the Michigan Supreme Court was filed on July 18, 1977. The jurisdiction of the United States Supreme Court is invoked under authority of 28 U.S.C. 1257 (3).

The Michigan Supreme Court, as a general rule, has followed the United States Supreme Court's decisions with respect to questions relating to illegal searches and seizures. The Michigan Supreme Court did so in the case at bench under authority of *United States* v *White,* 401 US 745; 91 S Ct 1122; 28 L Ed 2d 453 (1971). The Michigan Supreme Court rejected petitioner's illegal search and seizure claims under the *White* decision, *supra,* because it was "• • • of the opinion that were there to be further appeal on Fourth Amendment grounds, the view of the law which in all probability would be applied by the United States Supreme Court would be that expressed in Mr. Justice White's opinion" in the *White* case. (400 Mich at p 569, appendix, *infra,* at p A. 9)

In the Michigan Circuit Court murder trial of the petitioner, over the objection of his defense lawyer, the trial judge admitted into evidence a tape recorded telephone conversation between the petitioner and his girlfriend, the wife of the murder victim. In said conversation the petitioner admitted killing the deceased. Defense counsel's objection was that the tape recorded conversation was an illegal search and seizure, one conducted without a warrant where Detective Brown had ample time to obtain one, one conducted in violation of the petitioner's right to privacy and without his consent, and one conducted when the petitioner was not legally capable of making evidentiary admissions. (R. 371-373) Petitioner was ultimately convicted of first degree murder under Michigan law (MSA 28.548; MCLA 750.316), and was sentenced to prison for life.

The Fourth Amendment right against illegal searches and seizures was thereby preserved.

QUESTION PRESENTED

ISSUE I.

Whether the warrantless interception and recordation of petitioner's conversation without his knowledge or consent was constitutionally impermissible, and whether the admission into evidence of said recorded conversation at petitioner's murder trial renders his conviction invalid?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision which this petition involves is:

Constitution of the United States, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF FACTS

Michael Drielick, the petitioner herein, was convicted of the first degree murder of Daniel McNeil contrary to Michigan law and was sentenced to prison for life. (MSA 28.548; MCLA 750.316)

On November 30, 1972 petitioner was arrested for the murder of Daniel McNeil.

On the morning of November 13, 1972, the body of Daniel McNeil was found in the rear seat of his car which was parked in front of his parents' home. (R. 107) The coroner listed the cause of death as a gunshot wound to the head at close range, presumably from a .16 gauge shotgun. (R. 157) The pathologist related that he had removed from the decedent's head a lead fragment, shotgun wadding, and plastic material. (R. 157, 158) A State Police expert testified that these materials were "characteristic" of a .16 gauge Winchester shotgun shell. (R. 142-148)

Subsequent to the death of the decedent (Daniel McNeil), it was learned that his wife (with whom he was no longer living), Nancy McNeil, was in possession of a .16 gauge shotgun. (R. 264, 265) At the murder scene the only other real evidence found was the stock of a rifle or a shotgun.

Florence McNeil, the deceased's sister, lived next door to her parents' home. She related that she was reading in her living room with the curtains closed and not paying close attention when about 11:30 p.m. on November 12, 1972 Daniel McNeil parked his automobile in front of his parents' house and remained in it. About 1:30 to 2:00 a.m. another automobile with a loud muffler passed by slowly, returned shortly later, and stopped behind Daniel McNeil's automobile. Someone approached Daniel McNeil's automobile and then departed. At that time a loud noise was heard, like an automobile backfiring. The type and color

of this automobile and the identity of the person(s) in it were never identified at all. (R. 176-188) All that Florence McNeil could testify clearly to was that the automobile had a loud muffler. It was established at trial that at the time of Daniel McNeil's death that his wife, Nancy McNeil, was in possession of a 1963 white Oldsmobile, which presumably had a loud muffler. (R. 469) Outside of a taped conversation, the primary evidence against the petitioner, the only other evidence introduced by the prosecutor was that on the day before Daniel McNeil died the petitioner, in front of Nancy McNeil and Daniel McNeil's mother, made a threatening statement about the deceased. (R. 197, 200-201) It was also shown at trial that recently Nancy McNeil had publically stated that if Daniel McNeil did not cease threatening her and her daughter, that she would murder him. (R. 450-452)

The prosecutor contended that the petitioner, who was at Nancy McNeil's apartment on the evening of November 12, 1972, took Nancy McNeil's 1963 Oldsmobile, drove over to where Daniel McNeil had parked his automobile, passed by, returned for the shotgun, and then went back and murdered Daniel McNeil (R. 535-537), after having taken four (4) Equinol tranquilizers and drinking eleven (11) cans of beer earlier that evening. (R. 495-496)

During the two weeks succeeding Daniel McNeil's death, the detective, William Brown, talked to Nancy McNeil several times (R. 407) and requested several times that she take a polygraph test. (R. 407) Detective Brown testified that during this time period Nancy McNeil was a suspect (R. 21-22), and that by November 30, 1972, the day on which the petitioner was arrested, the police were in the accusatory stages with her. (R. 22-23)

By November 28, 1972 the police still lacked sufficient evidence on which to make an arrest or take someone into custody. On the evening of November 28th, Nancy McNeil

went to the Buena Vista Police Station, to relate to Detective Brown information about the death of Daniel McNeil. She told him that on November 20, 1972, the petitioner told her that he had murdered Daniel McNeil. (R. 277-282) Detective Brown asked her to telephone the petitioner from the police station and get him to talk about what happened the eve on which Daniel McNeil died. (R. 287) In response to Detective Brown's request, she agreed to let him listen to the conversation and record it. (R. 282-287) This wiretapping was done without a search warrant. During the recorded conversation, after stating that he had consumed a large quantity of pills in the past several days (R. 294), the petitioner made admissions about his involvement in the death of Daniel McNeil. (R. 297-298)

Two days later Detective Brown brought Nancy McNeil to the Buena Vista Police Station for additional questioning. According to Detective Brown's testimony, that morning from the police station Nancy McNeil telephoned the petitioner at work, telling him that "She had been picked up by the police and questioned and that the police knew who was involved in the incident, and that [they] had talked to her the night before. [The police] had talked to her all that day, that she wanted him to come in, they might as well just give up, because the police already knew and they had fingerprints from the forearm stock of a shotgun and everything else". (R. 17-20) According to the petitioner's testimony, Nancy McNeil told him that "she had been arrested, she had spent the night in jail, . . . they [the police] were going to get a warrant for myself, and that they had a piece of a gun with her fingerprints on it and my fingerprints on it, and they were going to take her to the Detroit Reformatory for Women. . . . She said she had a lawyer and he was there with her. . . . She said if I thought anything of her and Tammy [Nancy McNeil's daughter] I'd go down to the Buena Vista Police Station and take care of this thing." (R. 39-40)

The petitioner went to the Buena Vista Police Station that afternoon and talked to Detective Brown, out of concern for Nancy McNeil. At this time the petitioner believed that the above things told to him by Nancy McNeil were true. At the station he was told by Detective Brown that Nancy McNeil was at the jail and was being taken to the Detroit Reformatory for Women, in fact, that she was already on her way to Detroit. (R. 40-41)

After these occurrences the petitioner made a statement which led to his arrest. (Preliminary Exam. Trans. 41-42)

It was later established that all that happened was that Detective Brown had taken Nancy McNeil to the police station for questioning, had been fingerprinted at the county jail later on that day (but never detained there) and had made the above described telephone call to the petitioner. At this time the police did not know whose fingerprints were on the gunstock found by the victim's automobile. (Preliminary Exam. Trans. 23, 24, 26)

At trial Nancy McNeil and Detective Brown testified to the occurrence of the taped conversation on November 28, 1972, after which the tape was introduced into evidence and played for the jury. (R. 282, 285-300, 386-371) The jury also requested and were granted a rehearing of the tape during their deliberations. Petitioner's defense counsel objected to the admission of the tape into evidence, on the grounds that the procurement of the taped conversation was an illegal search and seizure, one conducted without a search warrant where Detective Brown had ample time in which to obtain one, one conducted in violation of the petitioner's right of privacy and without his consent, and one conducted when the petitioner was legally incapable of making evidentiary admissions. (R. 371-373)

The petitioner moved for a new trial on June 5, 1973, the motion being denied by the trial court.

The petitioner subsequently appealed to the Michigan Court of Appeals and the Supreme Court of Michigan, contending that: The warrantless interception and recording of his conversation was constitutionally impermissible. Both State Appellate Courts rejected petitioner's various Fourth Amendment claims. *People* v *Drielick,* 56 Mich App 664 (1974); *People* v *Drielick,* 400 Mich 559 (1977) (appendix, *infra,* pp A. 1-A. 13).

REASONS FOR GRANTING THE WRIT

I.

Petitioner's case presents to this Honorable Court the opportunity to resolve with finality the question of whether or not the warrantless interception and recording of a telephone conversation between petitioner and his girlfriend, Nancy McNeil, was constitutional in Fourth Amendment terms.

The recording at issue was used to convict the petitioner under Michigan law of the crime of first degree murder. A Michigan law enforcement officer induced petitioner's girlfriend to call the petitioner at his home from the police station and allegedly obtained her consent to monitor and record the conversation. The petitioner was without knowledge of the officer's conduct at the time it was taking place.

Petitioner contends here as he did in the Michigan Courts below, that under *Katz* v *United States,* 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967), the November 28, 1972 warrantless interception and recordation of his conversation without his knowledge or consent was constitutionally impermissible and that the admission into evidence of this conversation invalidated his first degree murder conviction.

Both the Michigan Court of Appeals and Michigan Supreme Court upheld the admissibility of the tape recorded

conversation at issue in this cause under authority of *United States* v *White,* 401 US 745; 91 S Ct 1122; 28 L Ed 2d 453 (1971) (see pp A. 1-A. 13, *infra.*) Petitioner however, maintains that both Courts below wrongly decided his claims. Of major significance is the fact that the *White* decision applied pre-*Katz* law. The surveillance in *White* occurred before the *Katz* decision, and that decision had previously been held to be nonretroactive in *Desist* v *United States,* 394 US 244; 89 S Ct 1030; 22 L Ed 2d 248 (1969).

There are undoubtedly factual distinctions to be made in the case at bench with *Katz,* i.e., the *Katz* case did not involve participant monitoring and the manner of interception was not the same. *Katz* represents a situation where the government placed an electronic listening and recording device outside a public telephone booth from which the defendant was making a call and obtained evidence to convict him for illegally transmitting wagering information.

The core issue in your petitioner's case is whether or not the fact that there was participant monitoring here can eliminate the search warrant requirement of the *Katz* case. Petitioner maintains that it cannot.

The records below are clear that petitioner did not consent nor did he intend to consent to have his conversations with Mrs. McNeil overheard by Detective Brown or recorded by him. In *Katz* it was made clear that "• • • the very nature of electronic surveillance precludes its use pursuant to the suspect's consent." (389 US, p 358; 88 S Ct, p 515)

Petitioner further maintains that Nancy McNeil could not constitutionally waive his rights under the Fourth Amendment. The Michigan Court of Appeals holding in this cause that Mrs. McNeil's consent obviated the necessity to obtain a search warrant (see p A. 11, *infra*), completely ignors this Court's several holdings rejecting the consent argument in the context of warrantless searches and sei-

zures. See e.g., *Chapman* v *United States*, 365 US 610; 81 S Ct 776; 5 L Ed 2d 828 (1961); *United States* v *Jeffers*, 342 US 48; 72 S Ct 93; 96 L Ed 59 (1951); *Stoner* v *California*, 376 US 483; 84 S Ct 889; 11 L Ed 2d 856 (1964).

Your petitioner would additionally assert that the question of whether or not Nancy McNeil gave her consent to listen to, and to record the conversation was not properly litigated in the Courts below. Petitioner submits that the trial court and the Michigan Court of Appeals below (A. 11) ignored the realities of the situation which demonstrated that Nancy McNeil merely purported to consent to the interception and the recording.

Petitioner maintains that the alleged consent of Nancy McNeil was not shown to have been voluntary. First of all, at the time of the listening and recording by Detective Brown on November 28, 1972, Nancy McNeil was herself a suspect and she was thus anxious to exculpate herself. Knowing that she was a suspect she informed Detective Brown that petitioner had admitted involvement in Daniel McNeil's death. Without ever having advised her of her right to refuse to consent to the monitoring and recording, Detective Brown induced her to call petitioner at his home from the police station and requested her to get petitioner to admit that he had killed Daniel McNeil. (R. 277-279, 287) As early as the preliminary examination and later at a hearing on the admissibility of the admission made by petitioner, Detective Brown testified that prior to the November 28, 1972 recording, he "implied" to Mrs. McNeil that "(He) thought she had committed the crime [i.e., killed Daniel McNeil], and had asked her several times to take a polygraph test, and when she indicated that she would rather get a lawyer, advised her that (He would) be keeping his eye on her and if she was going to get an attorney, to get a good one." (R. 407, Preliminary Exam. Trans. 20, 21) Detective Brown also testified that on November 30, 1972 he was in the "accusatory stage of the proceedings with her" and had administered Miranda warnings. (Preliminary Exam. Trans. 22, 23)

While this issue was not specifically raised in the trial court, your petitioner submits that there were enough facts presented to put the trial court on notice of the coerced consent issue. The Michigan Court of Appeals statement that the "record establishes that the consent was voluntary" (A. 11) was not a proper resolution of the issue despite the fact that there was no specific objection made at trial. Contrary to the decision of the Michigan Court of Appeals, the record facts presented to it clearly demonstrated involuntary consent, and not voluntary consent on the part of Nancy McNeil.

The case at bench very much parallels those situations found in *Weiss* v *United States*, 308 US 321, 330; 60 S Ct 269; 84 L Ed 298 (1939); *United States* v *Laughlin*, 223 F Supp 623 (1963), and *United States* v *Napier*, 451 F2d 552 (1971), where the party's consent was seriously questionable because of incapacity or government pressure. In the case at bench, your petitioner maintains that the factual situation is kindred to that found in *United States* v *Laughlin*, 222 F Supp 264 (1963). In that case the consent to tape was found involuntary in light of the "consentor's" testimony that "I felt I had to cooperate," 222 F Supp at p 266, under the implied threat of indictment if she did not. *Id.*, at p 268. Your petitioner submits that notwithstanding the failure to raise the issue at the trial court level, there were sufficient facts before the trial court that it should have been on notice of the voluntariness of consent issue and should have accordingly *sua sponte determined* (or conducted a hearing to determine) that the police, through Detective Brown initiated pressure on Mrs. McNeil for the purpose of overbearing her will, and should have thus held that her consent was involuntary, and accordingly should

have excluded the tape recorded evidence from the trial. The Michigan Court of Appeals determination (A. 11) is not supported by the record, and the fact that petitioner did not pursue this claim directly in his appeal to the Michigan Supreme Court should not preclude review by this Honorable Court in light of the way that the Michigan Supreme Court completely disregarded and did not respond to petitioner's claims that Mrs. McNeil could not consent or waive petitioner's rights against unreasonable searches and seizures in relation to the tape recorded conversation now at issue.

It has been about 10 years since this Honorable Court rendered its decision in the *Katz* case in 1967. Notwithstanding the various and sundry fictions in the realm of electronic surveillance, your petitioner maintains that participant monitoring as occurred in this case is within the rule of *Katz*. As far as expectations of privacy are concerned, whether it is looked at as the subjective state of mind of the petitioner or as a judgment of society, the petitioner's situation cannot be seriously distinguished from defendant Katz. Petitioner Drielick was most assuredly just as ignorant of police monitoring and recording as was the defendant in the *Katz* case. Further, petitioner's expectation of privacy could not be said to be less than that of the defendant in *Katz*. The Court in the *Katz* case declined to permit the choice of suspects to be electronically monitored to the unreviewed action of agents for the government.

Petitioner submits that state police officials cannot avoid the holding of the *Katz* case by turning over the responsibility for the surveillance to a private citizen such as Nancy McNeil in the case now before the Court.

The State of Michigan, since the decision in *Katz*, had the burden to obtain a warrant prior to electronically monitoring and recording petitioner's conversation with Nancy

McNeil, or to set forth facts that would bring the search and seizure at issue within one of the specifically delineated exceptions to the warrant requirement. See *United States* v *United States District Court,* 407 US 297 at 318; 92 S Ct 2125; 32 L Ed 2d 752 (1972). In the case at bench neither burden was met by the State of Michigan. Thus, it is respectfully submitted that the electronic monitoring and recording was constitutionally impermissible.

Your petitioner finds little solace or comfort in the Michigan Court of Appeals and Michigan Supreme Court decisions in his cause for they completely ignore or fail to apply the correct legal standards of the *Katz* case. Thus, it is submitted that review of petitioner's cause is warranted because of the failure and refusal of the Michigan Appellate Courts below to apply the *Katz* standards to his cause.

The Michigan Supreme Court in its opinion in this cause correctly points out that at the time of its issuance, 10 of the 11 United States Courts of Appeals have followed Mr. Justice White's lead opinion in *United States* v *White, supra,* in holding that the Fourth Amendment does not require a warrant for electronic participant monitoring. (see opinion, *infra,* at A. 7) The Michigan Supreme Court further correctly points out that on at least 14 occasions this Honorable Court has denied petitions for certoriari to review decisions of the United States Courts of Appeal holding that the Fourth Amendment does not preclude warrantless, electronic participant monitoring. (see opinion, *infra,* at A. 8) Notwithstanding these observations by the Michigan Supreme Court, the petitioner submits that the issue has been presented to this Court with such increasing frequency to demonstrate that it is of such major significance that the time has now come for a definitive major decision. This is especially so because many state appellate courts, including Michigan, have held that they are not bound by plurality opinions of the United States Supreme

Court. See e.g., *People* v *Plamondon,* 64 Mich App 413, 423 (1975), where the Michigan Court of Appeals determined that it was not bound to follow the plurality opinion in the *White* case, and instead followed the reasoning and views in the *White* case as expressed in the dissenting opinion of Justice Harlan. While the *Plamondon* case was reversed by the Michigan Supreme Court as part of its decision in your petitioner's case before the Michigan Supreme Court, your petitioner herein submits that the Court of Appeals in the *Plamondon* case, points up the need for review of this most significant issue presented in this Petition for a Writ of Certiorari.

CONCLUSION

Wherefore, petitioner respectfully prays that this Honorable Court will grant this Petition for a Writ of Certiorari to review the judgment of the Michigan Supreme Court.

Respectfully submitted,

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Dated: November 26, 1977.

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INDEX TO THE APPENDIX

OPINION OF THE SUPREME COURT

(Docket Nos. 56735, 57617)

Argued February 1, 1977 (Calendar Nos. 2, 3) — Decided July 18, 1977

400 Mich 559, ___ NW2d ___ (1977)

LEVIN, J. The issue is whether warrantless electronic eavesdropping of a telephone conversation, with the consent of one of the participants in the conversation, violates the Fourth Amendment prohibition against unreasonable searches and seizures.

In these cases, consolidated on appeal, a witness for the people telephoned the defendant at the suggestion of police officers and obtained damaging admissions which were electronically recorded. No warrant was obtained from a magistrate before installation of the electronic surveillance equipment. The recordings were played at the trial over defendant's objection.

A panel of the Court of Appeals affirmed Michael Drielick's conviction of first-degree murder[1] on the ground that a warrant is not required for participant monitoring. A separate panel reversed Lawrence Plamondon's and Craig Blazier's convictions of extortion by threat of accusation[2] on the ground that a warrant is required. We affirm in *Drielick*, and reverse in *Plamondon* and *Blazier*.

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[1] MCLA 750.316; MSA 28.548.

[2] MCLA 750.213; MSA 28.410.

I

In *People* v *Beavers,* 393 Mich 554; 227 NW2d 511 (1975),[3] this Court held that, unless authorized by a search warrant, a participant may not, consistent with the Michigan constitutional prohibition against unreasonable searches and seizures,[4] electronically monitor a conversation which is transmitted to law enforcement officers.

Beavers was given prospective effect only.[5] The participant monitoring in these cases preceded *Beavers.* The question whether the Michigan prohibition applies in the instant cases, which were pending on appeal with the issue preserved,[6] was decided by *Beavers.* The Court is not disposed to reconsider that recent decision.

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[3] Two police officers monitored, without authorization of a warrant, a conversation between the defendant and a police informant carrying a battery-operated radio transmitter under his shirt while the informant bought heroin from the defendant in defendant's home. The conversations were not recorded. The eavesdropping officers were permitted over objection to testify regarding the overheard conversations at the trial.

[4] Const 1963, Art 1, § 11.

[5] "The decision today is to be applied prospectively." *People* v *Beavers, supra,* p 568. *Beavers* was decided April 7, 1975.

[6] See *Desist* v *United States,* 394 US 244; 89 S Ct 1030; 22 L Ed 2d 248 (1969) where the United States Supreme Court, in holding that the exclusionary rule enunciated in *Katz* v *United States,* 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967), was prospective only, saw no distinction between final convictions and those still pending on appeal:

"All of the reasons for making *Katz* retroactive also undercut any distinction between final convictions and those still pending on review. Both the deterrent purpose of the

II

Defendants' principal claim is that warrantless participant monitoring violates the Federal constitutional prohibition against unreasonable searches and seizures. In *United States* v *White,* 401 US 745; 91 S Ct 1122; 28 L Ed 2d 453 (1971), the United States Supreme Court rejected this claim and held that police eavesdropping without a warrant on conversations between an accused and an informant by means of a radio transmitter concealed on the informant's person does not violate the Fourth Amendment.

Defendants contend that *White* does not control because: (i) no opinion in that case obtained the signatures of a majority of the sitting justices; (ii) the decision in *White* was based on pre-*Katz*[7] law because *Desist*[8] had held that *Katz* only applied prospectively and the monitoring in *White* preceded the decision in *Katz;* and (iii) *White* involved monitoring of a face-to-face conversation while the monitoring in these cases was of telephone conversations.

Mr. Justice White wrote the lead opinion in *White* which was signed by Chief Justice Burger and Justices Stewart

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[6] (Cont'd)
exclusionary rule and the reliance of law enforcement officers focus upon the time of the search, not any subsequent point in the prosecution, as the relevant date. Exclusion of electronic eavesdropping evidence seized before *Katz* would increase the burden on the administration of justice, would overturn convictions based on fair reliance upon pre-*Katz* decisions, and would not serve to deter similar searches and seizures in the future." *Desist* v *United States,* 394 US 244, at 253.

[7] *See* fn 6.

[8] *See* fn 6.

and Blackmun. Mr. Justice Black concurred on the ground that electronic eavesdropping does not constitute a "search" or "seizure" within the meaning of the Fourth Amendment. Mr. Justice Brennan concurred on the ground that *Katz* was not retroactive, adding that the Fourth Amendment interposes a warrant requirement. Justices Douglas, Harlan and Marshall signed separate dissenting opinions.

In *Katz,* the Court had held that electronic eavesdropping accomplished by attaching a listening and recording device to the outside of a public telephone booth, without the authorization of either participant in the conversation or of a warrant, was violative of the Fourth Amendment. The Court declared that the right to protection against unreasonable searches and seizures "cannot turn upon the presence or absence of a physical intrusion into any given enclosure", that the "trespass" doctrine enunciated in earlier decisions had been eroded and could no longer be regarded as controlling, and that the "Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied by using the telephone booth and thus constituted a 'search and seizure', within the meaning of the Fourth Amendment". *Katz* v *United States, supra,* p 353. The Fourth Amendment, said the Court, "protects people, not places". *Katz* v *United States, supra,* 351.

While Mr. Justice White's lead opinion in *White* said that the United States Court of Appeals had also erred because, by reason of *Desist* making *Katz* wholly prospective, *Katz* did not apply to the electronic surveillance in *White,* the primary thrust of the opinion was that there was no invasion of "the defendant's constitutionally justifiable expectations of privacy". "Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently

doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his." *White* v *United States, supra,* pp 751, 752. Since the law violator knows that what he says is being heard and may be repeated, no different result is required because the conversation is being listened to or recorded electronically with the consent of the faithless participant.

This Court, in *Beavers,* construing the Michigan constitutional prohibition, rejected the argument that participant monitoring was a "variant of the privilege of a party to repeat a conversation", and instead was "persuaded by the logic of Justice Harlan which recognizes a significant distinction between assuming the risk that communications directed to one party may subsequently be repeated to others and the simultaneous monitoring of a conversation by the uninvited ear of a third party functioning in cooperation with one of the participants yet unknown to the other". *People* v *Beavers, supra,* pp 563, 565.[9]

III

It is our duty to "determine with the best exercise of our mental powers of which we are capable that law which in all probability will be applied to these litgants or to others similarly situated" in the event of a further ap-

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[9] "The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society. • • •

"Were third-party bugging a prevalent practice, it might well smother that spontaneity — reflected in frivolous, impetuous, sacrilegious, and defiant discourse — that liberates daily life. Much offhand exchange is easily forgotten

peal of the Fourth Amendment issue from this Court to the United States Supreme Court.[10]

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[9] (Cont'd)
and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record. All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant.

* * *

"By casting its 'risk analysis' solely in terms of the expectations and risks that 'wrongdoers' or 'one contemplating illegal activities' ought to bear, the plurality opinion, I think, misses the mark entirely. *On Lee* does not simply mandate that criminals must daily run the risk of unknown eavesdroppers prying into their private affairs; it subjects each and every law-abiding member of society to that risk." *United States* v *White, supra,* pp 787-789 (Harlan, J.)

[10] *Spector Motor Service, Inc* v *Walsh,* 139 F2d 809, 814 (CA 2, 1943), *remanded on other grounds, Spector Motor Service, Inc* v *McLaughlin,* 323 US 101; 65 S Ct 152; 89 L Ed 101 (1944). Judge Learned Hand, in dissent, agreed on the governing principle:

"I conceive that the measure of its duty is to divine, as best it can, what would be the event of an appeal in the case before it." *Spector Motor Service, Inc* v *Walsh,* 139 F2d 809, 822, 823 (Hand, J.)

Similarly, see Mason v *United States,* 198 Ct Cl 599; 461 F2d 1364, 1375 (1972), *rev'd on other grounds,* 412 US 391; 93 S Ct 2202; 37 L Ed 2d 22 (1973); *Martin* v *Virginia,* 349 F2d 781, 784 (CA 4, 1965); *Perkins* v *Endicott Johnson Corp,* 128 F2d 208, 217 (CA 2, 1942), *aff'd, Endicott Johnson Corp* v *Perkins,* 317 US 501; 63 S Ct 339; 87 L Ed 424 (1943).

The United States Courts of Appeal for 10 of the 11 circuits have followed Mr. Justice White's lead opinion in *White* in holding that the Fourth Amendment does not require a warrant for electronic participant monitoring.[11] No distinction has been made between electronic monitoring of

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[11] *United States* v *Diaz,* 535 F2d 130, 133 (CA 1, 1976); *United States* v *Bonnano,* 487 F2d 654, 657-658 (CA 2, 1973); *United States* v *Santillo,* 507 F2d 629, 631-632 (CA 3, 1975); *United States* v *Dowdy,* 479 F2d 213, 229 (CA 4, 1973); *United States* v *Wilson,* 451 F2d 209, 212 (CA 5, 1971); *Stephan* v *United States,* 496 F2d 527, 528 (CA 6, 1974); *United States* v *Gocke,* 507 F2d 820, 823 (CA 8, 1974); *Holmes* v *Burr,* 486 F2d 55, 59-60 (CA 9, 1973); *United States* v *Puchi,* 441 F2d 697, 700 (CA 9, 1971); *United States* v *Quintana,* 457 F2d 874, 878 (CA 10, 1972); *United States* v *Bishton,* 150 US App DC 51; 463 F2d 887, 892 (1972).

A number of state courts have reached the same conclusion. *State* v *Wilder,* 18 Ariz App 410; 502 P2d 1087, 1088 (1972); *Kerr* v *State,* 256 Ark 738; 512 SW2d 13, 20-21 (1974); *People* v *Murphy,* 8 Cal 3d 349; 105 Cal Rptr 138; 503 P2d 594, 600-601 (1972); *People* v *Morton,* .... Colo ...., 539 P2d 1255, 1257 (1975); *State* v *Delmonaco,* 165 Conn 163; 328 A2d 672, 673 (1973); *People* v *Richardson,* 60 Ill 2d 189, 328 NE2d 260, 263 (1975); *McCarty* v *State,* .... Ind App ...., 338 NE2d 738, 741 (1975); *State* v *Wigley,* 210 Kan 472, 502 P2d 819, 821-822 (1972); *Avery* v *State,* 15 Md App 520, 292 A2d 728, 742-743 (1972); *Everett* v *State,* 248 So 2d 439, 442-443 (Miss, 1971); *State* v *Anepete,* 145 NJ Super 22; 366 A2d 996, 998 (1976); *People* v *Phillips,* .... App Div 2d ....; 390 NYS2d 6, 7 (1976); *Escobedo* v *State,* 545 P2d 210, 216 (Okla Crim, 1976); *Commonwealth* v *Donnelly,* 233 Pa Super 396; 336 A2d 632, 640-641 (1975); *Thrush* v *State,* 515 SW2d 122, 125 (Tex Crim App, 1974).

Other state courts, like Michigan, have concluded that warrantless electronic, participant monitoring is violative of a state constitutional prohibition. *Tollett* v *State* 272

face-to-face conversations and of telephonic communications.[12]

Since *White* was decided, Justices Black, Douglas and Harlan have left the Court, and Justices Powell, Rehnquist and Stevens have taken their places on the Court. All four justices who signed Mr. Justice White's opinion remain on the Court.

On at least 14 occasions the United States Supreme Court has declined to grant certiorari to review decisions of the United States Courts of Appeal holding that the Fourth Amendment does not preclude warrantless, electronic participant monitoring.[13] While denial of certiorari is not affirmance, it is a fact of some significance especially since there is no indication in subsequent decisions of the United

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[11] (Cont'd)
So 2d 490, 492-493 (Fla, 1973); *State ex rel Arnold* v *Rock County Court*, 51 Wis 2d 434, 187 NW2d 354, 356-357 (1971); *cf*, *State* v *Smith*, 72 Wis 2d 711, 242 NW2d 184, 186-187 (1976).

[12] *United States* v *Bonnano, supra; United States* v *Santillo, supra; United States* v *Dowdy, supra; United States* v *Wilson, supra; Stephan* v *United States, supra; United States* v *Puchi, supra; United States* v *Quintana, supra.*

[13] *United States* v *Warren*, 453 F2d 738 (CA 2, 1972), *cert den*, 406 US 944; 92 S Ct 2040; 32 L Ed 2d 331 (1972); *United States* v *Koska*, 443 F2d 1167 (CA 2, 1971), *cert den*, 404 US 852; 92 S Ct 92; 30 L Ed 2d 92 (1971); *United States* v *Santillo, supra, cert den sub nom Buchert* v *United States*, 421 US 968; 95 S Ct 1960; 44 L Ed 2d 457 (1975); *United States* v *Dowdy, supra, cert den*, 414 US 866; 94 S Ct 132; 38 L Ed 2d 118 (1973); *reh den*, 414 US 1117; 94 S Ct 851; 38 L Ed 2d 745 (1973); *United States* v *Wilson, supra, cert den sub nom Fairman* v *United States*, 405 US 1032; 92 S Ct 1298; 31 L Ed 2d 490 (1972); *United States* v *Caracci*, 446

States Supreme Court which would support the conclusion that the "doctrinal trend"[14] has shifted from the view expressed in Mr. Justice White's opinion.

We are of the opinion that were there to be a further appeal on Fourth Amendment grounds, the view of the law which in all probability would be applied by the United States Supreme Court would be that expressed in Mr. Justice White's opinion.

The Court of Appeals is reversed in *Plamondon* and *Blazier*, and affirmed in *Drielick*. The convictions are affirmed.

KAVANAGH C. J., and WILLIAMS, FITZGERALD, and BLAIR MOODY, JR., JJ., concurred with LEVIN, J.

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[13] (Cont'd)
F2d 173 (CA 5, 1971), *cert den*, 404 US 881; 92 S Ct 202; 30 L Ed 2d 162 (1971); *United States* v *Avila*, 443 F2d 792 (CA 5, 1971), *cert den*, 404 US 944; 92 S Ct 295; 30 L Ed 2d 258 (1971); *United States* v *Lippmann*, 492 F2d 314 (CA 6, 1974), *cert den* 419 US 1107; 95 S Ct 779; 42 L Ed 2d 803 (1975); *Stephan* v *United States, supra, cert den sub nom Marchesani* v *United States*, 423 US 861; 96 S Ct 116; 46 L Ed 2d 88 (1975); *United States* v *Gocke, supra, cert den* 420 US 979; 95 S Ct 1407; 43 L Ed 2d 660 (1975); *United States* v *King*, 472 F2d 1 (CA 9, 1972), *cert den sub nom Butler* v *United States*, 414 US 864; 94 S Ct 37, 40, 174; 38 L Ed 2d 84 (1973); *United States* v *Puchi, supra, cert den*, 404 US 853; 92 S Ct 92; 30 L Ed 2d 92 (1971); *United States* v *Quintana, supra, cert den*, 409 US 877; 93 S Ct 128; 34 L Ed 2d 130 (1972); *Holmes* v *Burr, supra, cert den*, 414 US 1116; 94 S Ct 850; 38 L Ed 2d 744 (1973).

[14] *See Spector Motor Service, Inc* v *Walsh, supra.*

RYAN, J. *(concurring).* I concur with Justice LEVIN that the evidence obtained as a result of the electronic participant monitoring in these cases was not obtained unconstitutionally despite the holding in *People* v *Beavers*, 393 Mich 554; 227 NW2d 511 (1975), because *Beavers*, having prospective application only, is inapplicable to these cases.

I am of the view as well that the evidence was not obtained in violation of the Fourth Amendment of the Constitution of the United States for the reasons announced by Mr. Justice White in his lead opinion in *United States* v *White*, 401 US 745, 746; 91 S Ct 1122; 28 L Ed 2d 453 (1971).

For the foregoing reasons alone I concur in the majority's disposition of these cases.

COLEMAN, J., concurred with RYAN, J.

OPINION OF THE COURT OF APPEALS

Appeal from Saginaw, Eugene Snow Huff, J.

Submitted Division 3 November 6, 1974 at Lansing

(Docket No. 17954) Decided November 26, 1974

Before: QUINN, P.J., and MCGREGOR and O'HARA,* JJ.

QUINN, P.J. A jury convicted defendant of first-degree murder, MCLA 750.316; MSA 28.548. He was sentenced and he appeals. The first five issues raised and briefed on

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* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

appeal arise from the admission, over objection, of a recorded telephone conversation between defendant and the wife of the victim.

Prior to the killing, defendant had been on intimate terms with Nancy McNeil, the estranged wife of the victim. At the time of the homicide, she was pregnant by defendant. Mrs. McNeil testified that defendant came to her apartment November 20, 1972 and told her that he had killed her husband with a gun that defendant had previously given to Mrs. McNeil. She testified further that when she looked for this gun and could not find it, she took an overdose of tranquilizer for which she was hospitalized.

When released from the hospital, Mrs. McNeil testified that she went to the police and informed them of defendant's admissions to her. Mrs. McNeil's testimony further indicated that at the request of the police, she telephoned defendant in an attempt to get him to admit the killing. She knew that this telephone call was to be recorded. During the call, defendant admitted killing Mr. McNeil.

In an attempt to evade the ruling of *United States* v *White*, 401 US 745; 91 S Ct 1122; 28 L Ed 2d 453 (1971), that consent by one party to a monitored conversation was sufficient to permit admission of the conversation in evidence, defendant argues that Mrs. McNeil's consent was involuntary. The argument fails because the record establishes that the consent was voluntary, and no objection was made at trial based on involuntariness of consent.

There was no necessity to obtain a search warrant to intercept the telephone conversation between defendant and Mrs. McNeil after she had consented thereto, *People* v *Karalla*, 35 Mich App 541; 192 NW2d 676 (1971).

The interception of that telephone conversation with Mrs. McNeil's consent involves no constitutional right of defendant, *People* v *Karalla, supra.*

Defendant contends that the trial court should have conducted a hearing on the voluntariness of defendant's admission of the killing made in the intercepted telephone conversation. The question of defendant's voluntariness in making the admission was never raised at trial.

Defendant stated at trial that the manner and tone of defendant's speech and the whole content of the conversation as reflected by the recorded telephone conversation should lead the court to conclude that defendant's mental state, because of drugs or alcohol, was such that he was incapable of speaking the truth. This would have required the hearing now contended for, if a confession was involved.

In *People* v *Porter,* 269 Mich 284, 290; 257 NW 705 (1934), the Supreme Court distinguished confession and admission as follows:

> "If the fact admitted necessarily amounts to a confession of guilt, it is a confession. If, however, the fact admitted does not of itself show guilt but needs proof of other facts, which are not admitted by the accused, in order to show guilt, it is not a confession but an admission * * *."

The admission by defendant that he killed McNeil would not establish that defendant murdered McNeil without proof of other facts not admitted by defendant. The trial court was dealing with an admission, the weight of which was properly left to the jury.

The record does not sustain defendant's contention that he was incompetent at the time of the recorded telephone conversation and failure to exclude the conversation on that ground is not error.

Finally, defendant asserts reversible error occurred when the trial court instructed on all lesser included offenses as well as on first-degree murder after defendant requested that the charge be limited to murder in the first degree. It

is understandable that defendant cites no authority for this position; all authority is to the contrary. The judge is statutorily bound to instruct on the law applicable to the case, MCLA 768.29; MSA 28.1052. If the record warrants, this includes lesser included offenses. The jury may find the defendant guilty of a lesser offense, MCLA 768.32; MSA 28.1055.

Affirmed.

All concurred.